BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THOMAS P. CIRCLE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,055,390
LABETTE COUNTY MEDICAL CLINIC	)	
Respondent	)	
AND	)	
	)	
WAUSAU GENERAL INSURANCE COMPANY	)	
and	)	
KANSAS HOSPITAL ASSOCIATION WCF, INC.	)	
Insurance Carriers	)	
	)	

ORDER

Respondent and its insurance carrier, Kansas Hospital Association WCF, Inc. request review of the September 8, 2011 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The Administrative Law Judge (ALJ) found that claimant suffered a new accident or a worsening of his preexisting condition in March 2011; that timely notice thereof was provided to respondent; and that timely written claim was served. Respondent and the Hospital Fund were ordered to provide authorized medical treatment with Dr. Tsu [sic].

Respondent and its insurance carrier [1] (respondent) request review of the following issues: 1) whether claimant sustained personal injury by accident in March 2011; 2) whether the alleged accidental injury arose out of and in the course of claimant's employment; 3) whether claimant provided respondent with timely notice of his alleged

[1] Two carriers are named as parties in this claim because claimant's alleged series of repetitive traumas straddles a change in carriers by the employer. The coverage of Wausau/Liberty Mutual ended on December 31, 2010 and the coverage of the Kansas Hospital Association WCF commenced on January 1, 2011. P.H. Trans. at 4-5.

accident pursuant to K.S.A. 44-520; and 4) whether claimant served timely written claim on respondent pursuant to K.S.A. 44-520a. Respondent argues that claimant failed to sustain his burden of proof on these issues, and therefore the ALJ's Order should be reversed.

Claimant argues that the ALJ's Order should be affirmed in all respects.

FINDINGS OF FACT

The record on appeal is the same as that considered by the ALJ, consisting of the transcript of preliminary hearing dated August 31, 2011, with exhibits, together with the pleadings contained in the administrative file.

Claimant, who was 40 years old at the time of the preliminary hearing, has been employed by respondent as an EMT since 2007. The parties agree that claimant last worked for respondent on March 28, 2011. Claimant alleges that he sustained personal injury by a series of repetitive accidents commencing on February 16, 2010, and continuing through March 28, 2011.

Claimant's duties as an EMT required both lighter activities and activities which were more physically strenuous. He assisted in lifting and moving patients which required bending at the waist. At times, patients were in awkward positions. The weights to be lifted depended on the size of the patient. Patients ranged in size from adults weighing up to 500 pounds to infants. Claimant also had to lift and move bags of equipment and medication weighing in the 30 to 50 pound range. Claimant's work as an EMT also included lighter duties such as talking to patients.

On February 16, 2010, claimant sustained an accidental injury to his low back while working for respondent. The injury occurred when claimant was assisting in the lifting of an elderly patient, who was located diagonally on the floor of a hallway in the patient's residence. Because of the patient's position, claimant had to lift, twist, and turn at the same time. Claimant reported the accident to his supervisor, Terry Staggs, the same day. On February 18, 2010, claimant completed a report of accident form, and Mr. Staggs accompanied claimant to the emergency room at Labette County Medical Clinic. Claimant was seen by Dr. Farris, who prescribed medication, heat, and the use of analgesic cream. Claimant was seen on two additional occasions at Labette County Medical Clinic on February 25, 2010 and March 8, 2010. Claimant was released from treatment without permanent restrictions on March 8, 2010.

Claimant continued to perform his regular duties for respondent and his back progressively worsened over the next year. Claimant testified that "[t]he more we lifted

and the more physical exertion we had, the worse the pain would become."[2] Claimant testified he notified respondent that his work was worsening his back. Specifically, claimant claims to have notified Travis Modesitt, claimant's immediate shift supervisor; Terry Staggs, who was identified as the Captain; and Marty Shields, office manager and administrative assistant.[3] Over the one year period after he was released from treatment for the February, 2010 injury, he told Mr. Modesitt, Mr. Staggs, and Ms. Shields on a approximately weekly basis that his back was worsening from the lifting or carrying required by his work.

Claimant returned to the Labette County Medical Clinic on Friday, April 2, 2011 complaining of severe low back pain with an onset on "Sunday."[4] Claimant testified that he had worked on Sunday, March 27, 2011 and experienced increased back pain lifting a patient in a nursing home. Claimant reported that incident to Mr. Modesitt. Based on a suggestion made at some point previously by Ms. Shields, claimant consulted a chiropractor, Dr. Chauncey Frisbie, on Monday, March 28, 2011. The patient history contained in Dr. Frisbie's records indicates that claimant's initial back injury occurred one year earlier with worsening due to lifting patients at work.[5]

Claimant called Mr. Staggs on Wednesday, March 30, 2011 and informed him that he could not perform his duties because he was in too much pain. In that conversation, claimant told Mr. Staggs that he had hurt his back again. Following his April 2, 2011 visit to the clinic, claimant again talked to Mr. Staggs. Claimant informed Mr. Staggs that he had been directed to undergo an MRI scan due to back pain resulting from heavy lifting. Claimant underwent a lumbar MRI scan on Wednesday, April 6, 2011, which revealed a posterior disc fragment right of midline at L5-S1 causing right lateral recess and neural foraminal stenosis. After the MRI scan, claimant returned to the clinic and it was recommended by a physician's assistant, Jill Pool, that claimant should consult a specialist. Claimant then saw Dr. Gery Hsu, a neurosurgeon, on April 28, 2011. Dr. Hsu diagnosed a large disc herniation on the right at L5-S1 with compression of the right S1 nerve root. Dr. Hsu recommended a microdiscectomy at L5-S1.

At some point following claimant's last day of work on March 28, 2011, claimant had a telephone conversation with Chris Sykes, who was employed in respondent's human resources department. Claimant described the conversation as one in which Ms. Sykes loudly declared that claimant had no workers compensation claim to pursue and that any

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[2] P.H. Trans. at 22.

[3] Ms. Shields apparently was not one of claimant's supervisors. P.H. Trans. at 51.

[4] P.H. Trans. Cl. Ex. 4. This exhibit also contains a written notation by the triage nurse which is not fully legible, but appears to say "To Rm 4 being (?) W/C."

[5] P.H. Trans. Cl. Ex. 5.

such claim would be denied. Claimant then retained counsel, who served written claim on respondent on April 8, 2011 for accidents occurring "each and every working day ending 3/28/11."[6] Claimant's counsel sent claimant to Dr. Edward Prostic. Dr. Prostic examined claimant on April 27, 2011, and concluded that claimant sustained repetitious minor trauma to the lumbar spine during the course of his employment with respondent. Dr. Prostic recommended treatment consisting of epidural steroid injections. If injections proved ineffective then claimant would require a discectomy. [7]

The ALJ entered an Order on June 16, 2011 appointing Dr. Pat Do to perform a neutral medical evaluation. Dr. Do examined claimant on July 6, 2011 and authored a report bearing that date. Dr. Do's report documents claimant's history of the initial lifting injury in February 2010, following which claimant developed right buttock pain and leg pain. Claimant's symptoms continued off and on throughout 2010 but worsened in March 2011. Dr. Do concludes:

> Within a reasonable degree of medical probability [claimant's] described work injury on or about February 2010 and his transporting the patients through March 28, 2011, I think is. . . causative for his complaints of right leg pain.[8]

Dr. Do recommended conservative treatment, and if such treatment didn't work then surgical treatment should be considered.

When cross-examined, claimant seemed to contradict himself regarding whether he discussed hurting his back again when he talked to Mr. Staggs on March 30, 2011.[9] During the telephone conversation claimant had with Mr. Staggs on April 2, 2011, claimant did not tell Mr. Staggs that he wanted to report a new workers compensation claim, however, claimant testified that he did tell Mr. Staggs, ". . . I was having the back pain because of work."[10]

Terry Staggs testified at the preliminary hearing. He is employed by respondent and was claimant's direct supervisor. He admitted that claimant was a good worker and an honest worker. Under hospital policy, claimant was required to report all work-related injuries to Mr. Staggs. Mr. Staggs testified regarding the 2010 injury and his testimony is consistent with claimant's in that regard. However, Mr. Staggs denied that claimant told him that he sustained a new work comp injury or a continuing work comp injury in the

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[6] *Id.*, Resp. Ex. 2 at 2.

[7] *Id.*, Cl. Ex. 7.

[8] *Id.*, Resp. Ex. 3.

[9] *Id.* at 48.

[10] *Id.* at 49.

period from March 2010 to March 2011. Mr. Staggs also denied that during the same one-year period claimant notified him that he was experiencing increased back pain due to his work. On approximately April 6, 2011, Mr. Staggs had a telephone conversation with claimant in which Mr. Staggs inquired whether claimant had sustained a new injury and claimant denied that he hurt himself on the job.[11] Claimant did not ask Mr. Staggs to send him for medical treatment.

Mr. Staggs talked with claimant before March 28, 2011 about his back and, according to Mr. Staggs, claimant said ". . . he didn't know what he had done to his back."[12]

Mr. Staggs also testified that he was present for a speaker phone conversation between claimant and Christina Sykes. According to Mr. Staggs, clamant denied that he was claiming a new workers compensation injury. On cross-examination, Mr. Staggs admitted that, although claimant was asked whether "it was work comp," claimant did not say yes or no.[13] The record does not reveal precisely when this conversation took place, however, it could have occurred on April 6, 2011.[14]

Mr. Staggs admitted that he found out that claimant was claiming a new workers compensation injury a few days before April 6, 2011 when he was so informed by Donald Richardson, an EMT, and Levi Saye, a paramedic. The record is unclear when Mr. Staggs was told by claimant that he was not alleging a new claim, however, Mr. Staggs thinks it was in a face-to-face conversation before March 28, 2011, the date claimant last worked.[15] It is likewise unclear when Mr. Staggs was informed by Mr. Richardson and Mr. Saye that claimant was asserting a new claim, although Mr. Staggs believes it was also before claimant last worked.[16]

Mr. Staggs was aware claimant was having problems with his back before March 28, 2011. He could tell by observing claimant that his back was bothering him. Mr. Staggs was also aware that claimant's back was getting progressively worse. On April 6, 2011, Mr. Staggs received a call from Jill Pool that claimant had contacted her and requested that respondent's medical records be changed to reflect that claimant's problems were work-related. In Mr. Stagg's phone conversation with claimant on April 6, 2011, claimant was

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[11] *Id.* at 86.

[12] *Id.* at 70.

[13] *Id.* at 80.

[14] *Id.*

[15] *Id.* at 76-77.

[16] *Id.*

asked about whether he had contacted Ms. Pool's office and asked that his records be altered. Claimant denied having done so.

Christopher Way, chief of emergency services for respondent, testified that during the last week of March, 2011, he was informed by Levi Saye and Terry Staggs that claimant was alleging he injured his back at work and was having problems related to his work. On Saturday, April 2, 2011, Mr. Way talked with claimant by telephone about a paramedic test claimant intended to take. During the course of that conversation, Mr. Way asked claimant whether he hurt his back at work, which claimant denied. It was at 1:30 a.m. on April 2, 2011, several hours before Mr. Way's conversation with claimant, that claimant sought emergency room treatment at Labette County Medical Clinic and gave a history of an onset of pain on "Sunday", presumably a reference to Sunday, March 27, 2011.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[17] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[18]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the

[17] K.S.A. 2010 Supp. 44-501(a).

[18] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[19]

Whether an accident arises out of and in the course of employment is a question of fact.[20] An accidental injury is compensable under the Workers Compensation Act if it only aggravates or accelerates an existing disease or intensifies the condition.[21] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[22]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-520a, provides in relevant part:

> (a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last

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[19] *Id.* at 278.

[20] Halford v Nowak Construction Co., 39 Kan. App. 2d 935, rev. denied 287 Kan. 765 (2008).

[21] Demars v Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978); Chinn v Gay and Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976).

[22] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

> payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

The preponderance of the credible evidence supports the finding that claimant sustained his burden of proof that he suffered a worsening of his condition between March 2010 and March 28, 2011, which arose out of and in the course of his employment with respondent. It is improbable that the injury sustained by claimant on February 16, 2010 completely resolved. Claimant's testimony indicates that his condition worsened during that period due to the lifting and carrying required by his work. The opinions of the neutral physician, Dr. Do, and Dr. Prostic support the finding that there was an aggravation of claimant's back over time as a consequence of the performance of his duties as an EMT. Moreover, claimant told Dr. Frisbie on March 28, 2011 that his initial back injury was one year before with worsening due to lifting patients at work.

Likewise, it is more likely than not that the progression of claimant's back symptoms became severe in March 2011. Claimant's series of repetitive accidents served to aggravate his back, causing a herniated disc at L5-S1. Respondent was well aware of both the worsening of claimant's back over time and the substantial worsening of his condition in March 2011. Mr. Staggs testified that he could tell by observing claimant before March 28, 2011 that claimant was having back problems and that those problems were getting worse. Also before March 28, 2011, Mr. Staggs was informed by two employees of respondent, Mr. Saye and Mr. Richardson, that claimant was claiming a new injury. Claimant testified that he notified Mr. Molesitt, claimant's shift supervisor of the worsening of his back in the period preceding claimant's last day of work. Claimant's testimony regarding what he told Mr. Molesitt is uncontradicted.

The testimony of claimant, Mr. Staggs and Mr. Way cannot easily be reconciled. Exactly when these witnesses talked to each other; whether their conversations took place in person or by telephone; and precisely what was said in each conversation are unclear at best. It seems probable that claimant may have denied that he was claiming a new work-related injury or injuries. He may have made such a denial more than once. It also seems likely that claimant may have said he wasn't sure what was going on with his back. Clearly, claimant was reluctant to turn in a formal claim for the worsening of his back condition. Also apparent is that claimant was uncertain whether the deterioration of his back condition was related to his 2010 claim or resulted from a new injury or injuries. However, based on the admissions of Mr. Staggs, respondent knew, even before claimant's last day of work, that claimant was asserting a new claim, and that claimant's back was worsening.

Where, as in this claim, there is conflicting evidence, the credibility of the witnesses may be important. The ALJ had the opportunity to personally observe the testimony of claimant, Mr. Staggs, and Mr. Way. Some deference may be given to the ALJ's findings

and conclusions because he was able to judge the witnesses credibility by personally observing them testify.

The preponderance of the credible evidence establishes that claimant sustained a series of repetitive accidents from February 16, 2010 through March 28, 2011. Under the version of K.S.A. 2010 Supp. 44-508(d) applicable to this claim, the date of accident for the series of repetitive traumas is April 8, 2011, the date claimant gave written notice to the employer. Respondent did not authorize any treatment in this claim following March 8, 2010, nor was claimant provided with physical restrictions. There is no evidence that claimant was provided with a written confirmation that his diagnosis was work-related.[23] Given the date of accident, claimant satisfied the 10 day notice requirement of K.S.A. 44-520 and the 200 day written claim requirement of K.S.A. 44-520a.

CONCLUSIONS

1. Claimant sustained his burden of proof by a preponderance of the credible evidence that he suffered personal injury by a series of repetitive accidents arising out of and in the course of his employment with respondent.

2. The date of accident for claimant's series of repetitive accidents is April 8, 2011.

3. Respondent was provided with timely notice.

4. Written claim was timely served.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[24] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated September 8, 2011, is modified to find a accident date of April 8, 2011, is otherwise affirmed.

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[23] *See Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 256 P.3d 828 (2011).

[24] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of December 2011.

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HONORABLE GARY R. TERRILL
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
John M. Graham, Attorney for Respondent and its Insurance Carrier
Wade A. Dorothy, Attorney for Resp. and Kansas Hospital Association WCF, Inc.
Thomas Klein, Administrative Law Judge